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No. 86-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HEUBLEIN, INC., a Connecticut corporation,
Appellant,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,
Appellees.

On Appeal from the Supreme Court of Georgia

APPELLANT'S REPLY BRIEF SUPPORTING JURISDICTIONAL STATEMENT AND OPPOSING MOTION TO DISMISS OR AFFIRM

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APPELLEES' MOTION TO DISMISS OR AFFIRM MUST BE DENIED

I. This Court has subject matter jurisdiction.

The Supreme Court of Georgia upheld state taxing statutes in the face of a challenge that they violate the United States Constitution. Consequently, as Appellees agree, 28 U.S.C.

1 The listing of all parent companies, subsidiaries, and affiliates of Appellant Heublein, Inc. set forth in the Jurisdictional Statement remains currently accurate. *See* Jurisdictional Statement, at *i*.

§1257(2) confers upon this Court jurisdiction to review the judgment of the Supreme Court of Georgia. *See* Motion To Dismiss or Affirm, at 2.

II. An exhaustive factual record is not required when a statute is facially challenged.

Throughout the proceedings below, Appellees persisted in arguing, by way of mischaracterization, that Heublein waived its challenge to the stated purpose of Georgia's facially discriminatory tax statutes. Appellees' Motion To Dismiss or Affirm relies, to the practical exclusion of any other argument, on the notion that this Court must uphold legislation which is constitutionally defective because Heublein did not "[develop a] factual record upon which to base its attack on the General Assembly's stated purpose in enacting Georgia's import tax." Motion To Dismiss or Affirm, at 7. Appellees' argument is a misguided attempt to distort the proper analysis of the questions presented.

Appellees fail to follow the appropriate constitutional principles that apply to Heublein's facial challenge to the Georgia statutes. The evidence that establishes Heublein's claim consists of the terms of the statutes themselves and their legislative history, both of which Heublein presented to the courts below. A party challenging a state statute on its face as violating the United States Constitution does not bear the burden of presenting any other factual basis for the challenge. *See 324 Liquor Corp. v. Duffy*, 107 S. Ct. 720 (1987); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

To the contrary, as recently as last Term, this Court held in *Maine v. Taylor*, 106 S. Ct. 2440 (1986), that "once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' *the burden falls on the State to demonstrate both that the statute 'serves a*

legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." Id. at 2448 (emphasis added). *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975), cited by Appellees, also supports Heublein's position that the mere recitation of an apparently legitimate purpose will not automatically shield from inquiry the actual purpose underlying a statutory scheme. When, as in the present case, it is apparent from the statutory scheme itself and from its history that the statutory purpose is contrary to the asserted purpose, this Court will examine and itself determine the legitimacy of the purported purpose of discriminatory legislation. *Id.* & n.16.

Repeatedly in the proceedings below, and also in their Motion To Dismiss or Affirm, Appellees concede that "the State has never attempted to deny that, but for the Twenty-first Amendment, Georgia's statutes would violate the Commerce Clause." Motion To Dismiss or Affirm, at 10. Consequently, it is plain that in accordance with *Maine v. Taylor,* the burden in this case falls squarely upon the State to justify the challenged legislation, and not upon Heublein to disprove the asserted justification. That fact notwithstanding, Heublein cited in its Jurisdictional Statement no less than eight references in which it argued throughout the proceedings below that the stated statutory purpose was insufficient to justify the discriminatory legislation. Jurisdictional Statement, at 24. Heublein did not acquiesce in the superior court's contrary decision, but expressly enumerated as error before the Georgia Supreme Court the conclusion that the challenged legislation serves a legitimate purpose. *Id.*

It is the State's lack of any basis to demonstrate how the discrimination can be justified upon which this Court should focus. Nevertheless, the principal argument advanced by Appellees is that this case must be dismissed or affirmed because Heublein waived the right to challenge the purpose of the challenged statutes. Such a position is patently false and misleading; it ignores the very essence of the facial challenge presented by this appeal.

III. The test advanced by Appellees in response to Heublein's constitutional challenge is erroneous.

The test that Appellees ask this Court to apply to the Georgia taxing scheme is: "The State's position has always been that, in the context of this case, the Twenty-first Amendment saves the statutes that would otherwise be unconstitutional under a pure Commerce Clause analysis." Motion To Dismiss or Affirm, at 10.

Stated differently, Appellees urge this Court to adopt the following logic:

1. The Georgia statutes discriminate against interstate commerce;
2. This discrimination is a conceded violation of the Commerce Clause;
3. Because, and only because, section 2 of the Twenty-first Amendment grants states the right to regulate the importation and use of alcoholic beverages, the taxes are constitutional, notwithstanding the admitted Commerce Clause infirmity.[2]

The three-step approach of Appellees is contrary to the teachings of this Court since the adoption of the Twenty-first Amendment, and most particularly, over the past eight years commencing with *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The test espoused by Appellees is one of *per se* validity, under which all liquor legislation would be granted a special immunity from constitutional challenge. Such an approach is fundamentally wrong.

The correct test to be applied in analyzing the challenged statutes is succinctly described by this Court in *Brown-*

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2 The fundamental flaw in Appellees' logic is the assertion that this step must be reached without evaluating and weighing the competing state and federal interests, *i.e.*, without applying the longstanding balancing test. *See* Motion To Dismiss or Affirm, at 10.

Forman Distillers Corp. v. New York State Liquor Authority, 106 S. Ct. 2080, 2084 (1986). Justice Marshall wrote in that case:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. . . . When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

This pronouncement could hardly be more clear. On the one hand, discriminatory state legislation, even in the name of the Twenty-first Amendment, is "virtually *per se* invalid under the Commerce Clause." On the other hand, in those cases when a statute regulates "evenhandedly," a balancing test must be applied. There is no dispute among the parties that the Georgia tax statutes discriminate against interstate commerce and, therefore, the question of their constitutionality is substantial and should be reviewed by this Court in the context of the *Brown-Forman* analysis. Heublein contends that the Georgia statutes cannot survive under either approach.

Next, in support of their Motion To Dismiss or Affirm, Appellees attempt to demonstrate how the present case is distinguishable from *Bacchus Imports, Ltd, v. Dias*, 462 U.S. 263 (1984). Motion To Dismiss or Affirm, at 12-15. First, Appellees point out that the tax in *Bacchus* was an excise tax

and not a tax on imports. This distinction without a difference is illustrative of Appellees' misconception of the constitutional framework this Court has established for evaluating discriminatory legislation. The critical issue is not what a state chooses to call a tax. Rather, the question is whether or not a tax constitutes economic protectionism, and as this Court stated in *Bacchus*: *"[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect."* 468 U.S. at 270 (emphasis added). There is no question in this case but that both the *actual* purpose and the conceded effect of the Georgia statutes is to discriminate against interstate commerce. The fact that the portion of the tax used to effect the discrimination is called an import tax, rather than an excise tax, is wholly immaterial to the required analysis. *See* Jurisdictional Statement, at 4, 5 & n.1.

Appellees also argue that *Bacchus* should not control this case because the stated purpose of the challenged Hawaiian tax was the promotion of local industry. Again, this argument is unpersuasive for two reasons. First, as previously stated, economic protectionism may be found by either a discriminatory purpose *or* effect, and there is no question that the effect of the challenged Georgia taxes is to confer a material competitive advantage upon Georgia producers of alcoholic beverages by requiring importers to pay up to four times the taxes paid by local producers. Therefore, to focus only on the stated purpose of the Hawaii tax at issue in *Bacchus* is yet another example of Appellees' efforts to shift this Court's attention away from reality.

Second, and of paramount importance, the Georgia legislature, in substance, enacted a taxing scheme just as discriminatory as that struck down in *Bacchus,* but Georgia did so with a facade in order to escape this Court's mandates. Since the 1930's, Georgia has employed a taxing scheme that discriminates against out-of-state producers and grants to local producers and producers of alcoholic beverages manufactured from Georgia-grown products a substantial

advantage, protectionist purposes still apparent on the face of the challenged legislation. Official Code of Ga. Ann. § 3-4-60(3).

In response to the *Bacchus* decision, the Georgia legislature repealed its discriminatory tax and created an even-handed system, but just one day later, it repealed the nondiscriminatory legislation in favor of the statutes challenged in this case. In their Motion To Dismiss or Affirm, Appellees totally ignore these facts presented by Heublein. The only notable difference between the statutes here in question and the discriminatory scheme which predated Georgia's "single day of fairness" was the purported purpose clause, which clearly was drafted in an attempt to evade the mandates handed down in *Bacchus*. Appellees, therefore, would have this Court dismiss this appeal or affirm the erroneous decision of the Georgia Supreme Court simply because the drafters of the suspect legislation stated, with no substantiation whatsoever, that it costs more to regulate the importation of alcoholic beverages.[3] By the same reasoning, Appellees apparently would argue that if the Hawaii legislature simply reenacts the discriminatory tax struck down by this Court, but grafts the tax with a new purpose clause like the one in the Georgia legislation, then the outcome in *Bacchus* would be different, notwithstanding the *discriminatory effect* on interstate commerce which would result without regard to the stated purpose. Clearly, such a scenario lacks all credibility.

In short, Heublein places reliance upon the decision in *Bacchus* because it is a clear application of this Court's long-standing decisions on the relationship between the Commerce Clause and the Twenty-first Amendment. The dismissal of this appeal, or the affirmance of the decision of the Georgia Supreme Court, cannot be reconciled with *Bacchus*.

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3 It is also worthy of note that the costs of administering and regulating the importation of alcoholic beverages have never been held to be a core concern of the Twenty-first Amendment. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984).

CONCLUSION

This Court stated in *Bacchus* that "[a] cardinal rule of Commerce Clause jurisprudence is that '[n]o State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." ' " *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 268. Nothing contained in the *Bacchus* decision, or any decision since, has altered this cardinal rule. In fact, as this Court held in *Brown-Forman*, if a state statute discriminates against interstate commerce it is "virtually *per se* invalid." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. at 2084.

Even if a balancing approach is applied to the Georgia taxes, the outcome would not change. The federal interest in preventing discrimination in interstate commerce is so clear and substantial that the stated purpose of the legislation could not be justified. This result becomes even more obvious when viewed in conjunction with the manner in which the legislature created the purpose clause; the fact, evident from the face of the statutes, that no tax increase actually was implemented despite the stated purpose of the need to fund the increased costs of regulating the importation of alcoholic beverages; and the fact, also apparent from the legislation's terms, that the tax dollars generated by the discriminatory taxes are not earmarked to pay for the costs of regulating importation, but rather are relegated to the Georgia general revenue fund for unrelated purposes such as education and public welfare. Furthermore, even if the State of Georgia truly believes that the challenged taxing scheme is justified because it implicates the core concerns of the Twenty-first Amendment, there simply is no authority whatever in support of the notion that those core powers can be utilized in a discriminatory fashion.

Under any approach, the Georgia taxes must fall. Absent such a result, a new rule of *per se* validity will emerge such that any kind of discrimination will prevail so long as the Twenty-first Amendment is in some way invoked. The

Twenty-first Amendment was not adopted to immunize discrimination. It must coexist with the other Amendments and provisions of the United States Constitution and not be utilized to breathe life into a taxing scheme which could not survive scrutiny under such other Amendments and provisions.

For the reasons stated in Heublein's Jurisdictional Statement and in this brief, Appellees' Motion To Dismiss or Affirm must be denied and the decision of the Georgia Supreme Court reversed.

Respectfully submitted,
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AFFIDAVIT OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON } ss.:

Personally appeared before the undersigned officer duly authorized to administer oaths in the state and county aforesaid, JOHN L. SCHAUB, who first being duly sworn, deposes and says as follows:

I am one of the attorneys for Appellant Heublein, Inc. in this matter. I hereby certify that I have this day served the accompanying Appellant's Reply Brief Supporting Jurisdictional Statement and Opposing Motion To Dismiss or Affirm upon each party to this proceeding in the manner prescribed by U.S. Sup. Ct. R. 28.3 at or before the time of filing thereof by depositing three copies thereof in a United States post office or mailbox, with first-class postage prepaid, addressed to counsel of record for Appellees at his post office address as follows:

State of Georgia, Governor Joe Frank Harris,
Marcus E. Collins, Georgia State Revenue
Commissioner, and
Claude L. Vickers, Director of the Fiscal Division
of the Department of Administrative Services,

through their counsel of record,
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I hereby further certify pursuant to U.S. Sup. Ct. R. 28.5 that all parties required to be served with the accompanying Appellant's Reply Brief Supporting Jurisdictional Statement and Opposing Motion To Dismiss or Affirm, whose names and addresses are set forth above, have been served as set forth herein.

Dated: May 14, 1987.

/s/_____

John L. Schaub

Sworn to and subscribed before me
this 14th day of May, 1987.

/s/_____

Notary Public